

## HOUSE BILL NO. 349

INTRODUCED BY C. YOUNKIN

1  
2  
3  
4 A BILL FOR AN ACT ENTITLED: "AN ACT ALLOWING A PEACE OFFICER ARRESTING A PERSON FOR AN  
5 OFFENSE AGAINST A PERSON TO REQUEST A WITHDRAWAL OF THE ARRESTED PERSON'S BLOOD  
6 IF THE PEACE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE ARRESTED PERSON'S BLOOD  
7 IS OR CONTAINS EVIDENCE OF THE OFFENSE; INCREASING LICENSE SUSPENSION PERIODS FOR  
8 FAILURE TO TAKE AN IMPLIED CONSENT TEST; REVISING AND CLARIFYING PROVISIONS RELATING  
9 TO TESTS TAKEN BY MEDICAL PERSONNEL FOR MEDICAL TREATMENT PURPOSES; ALLOWING  
10 PHYSICIAN ASSISTANTS-CERTIFIED TO ADMINISTER TESTS; AND AMENDING SECTIONS 46-5-102,  
11 61-8-402, 61-8-404, AND 61-8-405, MCA."

12

13 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

14

15 **Section 1.** Section 46-5-102, MCA, is amended to read:

16 **"46-5-102. Scope of search incident to arrest.** (1) When a lawful arrest is effected, a peace officer  
17 may reasonably search the person arrested and the area within ~~such~~ the arrested person's immediate presence  
18 for the purpose of:

19 ~~(1)~~(a) protecting the officer from attack;

20 ~~(2)~~(b) preventing the person from escaping;

21 ~~(3)~~(c) discovering and seizing the fruits of the crime; or

22 ~~(4)~~(d) discovering and seizing any persons, instruments, articles, or things ~~which~~ that may have been  
23 used in the commission of or ~~which~~ that may constitute evidence of the offense.

24 (2) If a lawful arrest is effected for an offense under Title 45, chapter 5, and the peace officer has  
25 probable cause to believe that the arrested person's blood may constitute or contain evidence of the offense the  
26 person was arrested for, those facts alone constitute an exigent circumstance requiring the withdrawal of the  
27 person's blood without a search warrant and the peace officer may request that the person allow a physician,  
28 physician assistant-certified, registered nurse, or other qualified person to withdraw the person's blood to  
29 preserve evidence."

30

1           **Section 2.** Section 61-8-402, MCA, is amended to read:

2           **"61-8-402. Blood or breath tests for alcohol, drugs, or both.** (1) A person who operates or is in  
3 actual physical control of a vehicle upon ways of this state open to the public is considered to have given  
4 consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount  
5 or detected presence of alcohol or drugs in the person's body.

6           (2) (a) The test or tests must be administered at the direction of a peace officer when:

7           (i) the officer has reasonable grounds to believe that the person has been driving or has been in actual  
8 physical control of a vehicle upon ways of this state open to the public while under the influence of alcohol,  
9 drugs, or a combination of the two and the person has been placed under arrest for a violation of 61-8-401;

10           (ii) the person is under the age of 21 and has been placed under arrest for a violation of 61-8-410; or

11           (iii) the officer has probable cause to believe that the person was driving or in actual physical control of  
12 a vehicle in violation of 61-8-401 and the person has been involved in a motor vehicle accident or collision  
13 resulting in property damage, bodily injury, or death.

14           (b) The arresting or investigating officer may designate which test or tests are administered.

15           (3) A person who is unconscious or who is otherwise in a condition rendering the person incapable of  
16 refusal is considered not to have withdrawn the consent provided by subsection (1).

17           (4) If an arrested person refuses to submit to one or more tests requested and designated by the officer  
18 as provided in subsection (2), the refused test or tests may not be given, but the officer shall, on behalf of the  
19 department, immediately seize the person's driver's license. The peace officer shall immediately forward the  
20 license to the department, along with a report certified under penalty of law stating which of the conditions set  
21 forth in subsection (2)(a) provides the basis for the testing request and confirming that the person refused to  
22 submit to one or more tests requested and designated by the peace officer. Upon receipt of the report, the  
23 department shall suspend the license for the period provided in subsection (6).

24           (5) Upon seizure of a driver's license, the peace officer shall issue, on behalf of the department, a  
25 temporary driving permit, which is effective 12 hours after issuance and is valid for 5 days following the date of  
26 issuance, and shall provide the driver with written notice of the license suspension or revocation and the right  
27 to a hearing provided in 61-8-403.

28           (6) The following suspension and revocation periods are applicable upon refusal to submit to one or  
29 more tests:

30           (a) upon a first refusal, a suspension of ~~6 months~~ 1 year with no provision for a restricted probationary

1 license;

2 (b) upon a second or subsequent refusal within 5 years of a previous refusal or upon a first refusal by  
 3 a person whose license is under suspension or revocation in this or any other state for any reason, as  
 4 determined from the records of the department, a revocation of ~~4-year~~ 3 years with no provision for a restricted  
 5 probationary license.

6 (7) A nonresident driver's license seized under this section must be sent by the department to the  
 7 licensing authority of the nonresident's home state with a report of the nonresident's refusal to submit to one or  
 8 more tests.

9 (8) The department may recognize the seizure of a license of a tribal member by a peace officer acting  
 10 under the authority of a tribal government or an order issued by a tribal court suspending, revoking, or reinstating  
 11 a license or adjudicating a license seizure if the actions are conducted pursuant to tribal law or regulation  
 12 requiring alcohol or drug testing of motor vehicle operators and the conduct giving rise to the actions occurred  
 13 within the exterior boundaries of a federally recognized Indian reservation in this state. Action by the department  
 14 under this subsection is not reviewable under 61-8-403.

15 (9) A suspension under this section is subject to review as provided in this part.

16 (10) This section does not apply to blood and breath tests, samples, and analyses:

17 (a) used for purposes of medical treatment or care of an injured motorist ~~or related to a lawful seizure~~  
 18 ~~for a suspected violation of an offense not in this part; or~~

19 (b) from a person arrested for negligent vehicular assault under 45-5-205 [or vehicular homicide under  
 20 section 1 of LC 1281]."

21

22 **Section 3.** Section 61-8-404, MCA, is amended to read:

23 **"61-8-404. Evidence admissible -- conditions of admissibility.** (1) Upon the trial of a criminal action  
 24 or other proceeding arising out of acts alleged to have been committed by a person in violation of 61-8-401,  
 25 61-8-406, 61-8-410, or 61-8-805:

26 (a) evidence of any measured amount or detected presence of alcohol, drugs, or a combination of  
 27 alcohol and drugs in the person at the time of a test, as shown by an analysis of the person's blood or breath,  
 28 is admissible. A positive test result does not, in itself, prove that the person was under the influence of a drug  
 29 or drugs at the time the person was in control of a motor vehicle. A person may not be convicted of a violation  
 30 of 61-8-401 based upon the presence of a drug or drugs in the person unless some other competent evidence

1 exists that tends to establish that the person was under the influence of a drug or drugs while driving or in actual  
2 physical control of a motor vehicle within this state.

3 (b) a report of the facts and results of one or more tests of a person's blood or breath is admissible in  
4 evidence if:

5 (i) a breath test or preliminary alcohol screening test was performed by a person certified by the forensic  
6 sciences division of the department to administer the test;

7 (ii) a blood sample was analyzed in a laboratory operated or certified by the department or in a laboratory  
8 exempt from certification under the rules of the department and the blood was withdrawn from the person by a  
9 person competent to do so under 61-8-405(1);

10 (c) a report of the facts and results of a physical, psychomotor, or physiological assessment of a person  
11 is admissible in evidence if it was made by a person trained by the department or by a person who has received  
12 training recognized by the department.

13 (2) If the person under arrest refused to submit to one or more tests as provided in this section, proof  
14 of refusal is admissible in any criminal action or proceeding arising out of acts alleged to have been committed  
15 while the person was driving or in actual physical control of a vehicle upon the ways of this state open to the  
16 public, while under the influence of alcohol, drugs, or a combination of alcohol and drugs.

17 (3) The provisions of this part do not limit the introduction of any other competent evidence bearing on  
18 the question of whether the person was under the influence of alcohol, drugs, or a combination of alcohol and  
19 drugs, including but not limited to competent evidence consisting of any test for alcohol, drugs, or a combination  
20 of alcohol and drugs relied upon by a physician, physician assistant-certified, registered nurse, or other qualified  
21 person in rendering necessary medical aid or treatment."

22

23 **Section 4.** Section 61-8-405, MCA, is amended to read:

24 "**61-8-405. Administration of tests.** (1) Only a physician, physician assistant-certified, or registered  
25 nurse, or other qualified person ~~acting under the supervision and direction of a physician or registered nurse,~~  
26 may, at the request of a peace officer, withdraw blood for the purpose of determining any measured amount or  
27 detected presence of alcohol, drugs, or any combination of alcohol and drugs in the person. This limitation does  
28 not apply to the sampling of breath.

29 (2) In addition to any test administered at the direction of a peace officer, a person may request that an  
30 independent blood sample be drawn by a physician, physician assistant-certified, or registered nurse, or other

1 qualified person for the purpose of determining any measured amount or detected presence of alcohol, drugs,  
2 or any combination of alcohol and drugs in the person. The peace officer may not unreasonably impede the  
3 person's right to obtain an independent blood test. The officer may but has no duty to transport the person to  
4 a medical facility or otherwise assist the person in obtaining the test. The cost of an independent blood test is  
5 the sole responsibility of the person requesting the test. The failure or inability to obtain an independent test by  
6 a person does not preclude the admissibility in evidence of any test given at the direction of a peace officer.

7 (3) Upon the request of the person tested, full information concerning any test given at the direction of  
8 the peace officer must be made available to the person or the person's attorney.

9 (4) ~~A Except for gross negligence or intentional misconduct, a physician, physician assistant-certified,~~  
10 ~~or registered nurse, or other qualified person acting under the supervision and direction of a physician or~~  
11 ~~registered nurse,~~ does not incur any civil or criminal liability as a result of the ~~proper~~ administering of a blood  
12 test when requested in writing by a peace officer to administer a test.

13 (5) The department in cooperation with any appropriate agency shall adopt uniform rules for the giving  
14 of tests and may require certification of training to administer the tests as considered necessary."  
15

16 NEW SECTION. Section 5. Coordination instruction. If [LC 1281] is not passed and approved with  
17 a section creating a new criminal offense of vehicular homicide, then the bracketed language inserted in  
18 61-8-402(10) by [section 2] is void.

19

- END -